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No. 96-1236

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KRYGOSKI CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY OF THE PETITIONER TO THE OPPOSITION OF THE UNITED STATES TO PETITION FOR WRIT OF CERTIORARI

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15 pp

RULE 29.6 STATEMENT

Petitioner Krygoski Construction Company has no parent corporation and has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

RULE 29.6 STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENT 1

A. The Panel Decision Conflicts with Existing Precedent and Adds to the Confusion Surrounding the Exercise of Government Contract Termination Clauses 1

B. CICA Does Not Apply to Convenience Terminations Nor Does It Resolve the Confusion Surrounding the Issues Raised in *Torncello* 4

C. The Federal Circuit's Lenient Review of the Contracting Officer's Decision for Bad Faith or Abuse of Discretion Does Not Ensure That the Government's Promise is Supported by Consideration 6

D. The Fundamental Issue in This Case is the Meaning of the Convenience Termination Clause 7

E. The Present Dispute Is an Appropriate Case for Resolution 9

CONCLUSION 10

TABLE OF AUTHORITIES continued

Page

AT&T Communications v. WilTel, 1 F.3d 1201, 1205 (Fed. Cir. 1993) 6

Caldwell & Santmyer, Inc. v. Glickman, 55 F.3d 1578 (Fed. Cir. 1995) 3,6

Colonial Metals v. United States, 494 F.2d 1355 (Ct. Cl. 1974) 8

Edo Corp. v. Beech Aircraft Corp., 911 F.2d 1447 (10th Cir. 1990) 3

Government Systems Advisors, Inc. v. United States, 21 Cl. Ct. 400, *vacated*, 25 Cl. Ct. 554 (1990) 3

Madera Irrigation Dist. v. Hancock, 985 F.2d 1397 (9th Cir. 1993) 3

Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988) 6

Pacificorp Capital, Inc. v. United States, 25 Cl. Ct. 707 (1992) 3

Salsbury Industries v. United States, 905 F.2d 1518 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991) 2

Torncello v. United States, 681 F.2d 756 (Cl. Ct. 1982) (*en banc*) ..... passim

STATUTES

Competition in Contracting Act of 1984, Pub. L. No. 98-369, Tit. VII, § 303A, 98 Stat. 1175 4

REGULATIONS

10 U.S.C. § 2305 (1994) 5

TABLE OF AUTHORITIES continued

Page

48 C.F.R. 1.602-2 (1997) 5

OTHER AUTHORITIES

130 Cong. Rec. S5025 (daily ed. Apr. 30, 1984) 4

H.R. REP. NO. 861, 98th Cong., 2d Sess., (1984), *reprinted in* 1984 U.S.C.C.A.N. 2109, 2110 5

2A NORMAN J. SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION §§ 47.23-47.25 (5th ed. 1992) 5

Petitioner Krygoski Construction Company ("Krygoski") hereby replies to the opposition of the United States to Krygoski's petition for a writ of certiorari.

ARGUMENT

A. The Panel Decision Conflicts with Existing Precedent and Adds to the Confusion Surrounding the Exercise of Government Contract Termination Clauses

In its opposition, the government attempts to downplay the conflict the panel decision creates with Supreme Court and Federal Circuit precedent. In addition, the government dismisses the confusion surrounding the permissible exercise of government contract termination clauses.

The government argues that the cases relied upon by Krygoski are inapplicable to this case because they involved indefinite quantities contracts with no minimum quantities. *See* Brief for the United States in Opposition ("Opposition") at 8 n.2. The government fails to recognize, however, that the requirement for consideration, which is the heart of the issue in this case, is present in all types of contract.

The contract in this case encompassed the complete demolition of a government missile site, including asbestos abatement. The asbestos abatement was stated as an indefinite quantity with unit prices. No minimum was stated, and all government witnesses testified the contract included all asbestos. Petition at 27b n.24. As the trial court found, the parties to the contract intended it to encompass the complete removal of asbestos from the missile site. *See, e.g.,* Petition at 45b. Consequently, the contract is akin to a requirements contract like the contract in *Torncello v. United States*, 681 F.2d 756 (Cl. Ct. 1982) (*en banc*). Having contracted with Krygoski

for all asbestos abatement, the government could not separately contract with anyone else for the same task.

By terminating the contract, the government took away from Krygoski not only the asbestos abatement, but also all other aspects of the contract. By allowing the government to terminate the contract at any time, in the absence of any change in circumstances, the Federal Circuit panel essentially made illusory the government's promise to use Krygoski for the demolition, including all asbestos abatement. By upholding the enforceability of such a contract, the Federal Circuit decision is in conflict with the Supreme Court case law set forth in the Petition. *See* Petition at 22-23.

The panel decision also conflicts with other decisions of the Federal Circuit. The decision is clearly in conflict with *Torncello*[1] and *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988), the only other Federal Circuit decision to analyze the issue of consideration. The government attempts to distinguish *Maxima Corp.* on the grounds that it involved a government attempt to terminate the contract retroactively after completion of the contract. A review of the *Maxima Corp.* decision, however, reveals that its use of the *Torncello* "changed circumstances" test was in no way linked to that particular fact of the case. *See id.* at 1552-53; *see also* Petition at 20 n.10 (criticizing the panel's treatment of *Maxima Corp.*).

The government's attempt to portray the case law in this area as "uniform" in light of the decisions in *Salsbury Industries v. United States*, 905 F.2d 1518 (Fed.

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[1] *Torncello* was considered *en banc* by the Court of Claims, the predecessor court to the Federal Circuit. As the trial court noted, decisions of the Court of Claims were adopted as precedent by the Federal Circuit and can be overruled by the Federal Circuit only when sitting *en banc*. *See* Petition at 21b.

Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991), and *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578 (Fed. Cir. 1995), is incorrect. Trial courts have continued to apply *Torncello* inconsistently. *See, e.g., Pacificorp Capital, Inc. v. United States*, 25 Cl. Ct. 707, 719-21 (1992) (finding the existence of changed circumstances justified the government's contract termination). The court in *Pacificorp Capital* mentions *Salsbury* only briefly and does not suggest that *Salsbury* changed the fundamental holding in *Torncello*. *Id.* at 721; *see also Government Systems Advisors, Inc. v. United States*, 21 Cl. Ct. 400, 409-410 (construing *Salsbury* as merely an extension of the *Torncello* changed circumstances test), *vacated on other grounds*, 25 Cl. Ct. 554 (1990).

Even after the decision in *Caldwell & Santmyer* and the panel opinion in this case, the circuit law remains confusing, and commentators still "wonder whether this mess will ever be straightened out." Petition at 17g. The trial judge in this case recognized the continued confusion on this issue and requested guidance on the conflicting case law. *See* Petition at 20b n.15.

Finally, although the exclusive jurisdiction of the Federal Circuit prevents a direct conflict,[2] the panel decision is at least inconsistent with the interpretation of *Torncello* by other circuits. *See, e.g., Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1405 (9th Cir. 1993) (relying on *Torncello* for the proposition that "the government cannot reserve to itself an unlimited right to escape its contractual obligations 'without rendering its promises illusory and the contract void'"); *Edo Corp. v. Beech Aircraft Corp.*, 911 F.2d 1447, 1452-53 (10th Cir.

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[2] As Krygoski pointed out in its Petition, no circuit conflict can exist on this issue because the Federal Circuit has exclusive jurisdiction to hear appeals from the Court of Federal Claims and the various boards of contract appeals. *See* Petition at 18 n.8.

1990) (upholding the trial court's application of the changed circumstances test of *Torncello* but ruling that such a finding was unnecessary because the termination clause, unlike the one in *Torncello*, was supported by consideration). The conflict and confusion both within and without the Federal Circuit on the proper application of the changed circumstances test justify granting the petition in this case.

B. CICA Does Not Apply to Convenience Terminations Nor Does It Resolve the Confusion Surrounding the Issues Raised in *Torncello*

The government also points to the panel's reliance on the Competition in Contracting Act of 1984, Pub. L. No. 98-369, Tit. VII, 98 Stat. 1175 ("CICA"), and argues that the requirement for "full and open competition" contained in CICA supersedes the changed circumstances requirement of *Torncello*. Opposition at 10-11. Frankly, Krygoski considers CICA to be a complete "red herring" with respect to the issues in this case. The termination of contracts for the convenience of the government is nowhere addressed in CICA. In their reliance on the statute, both the Federal Circuit panel and the government misconstrue the purpose and effect of CICA on the contract at issue.

CICA was enacted in 1984 to "establish an absolute preference for competition and to provide more flexibility in contracting." *See* 130 Cong. Rec. S5025 (daily ed. Apr. 30, 1984) (statement of Sen. Cohen). Prior to the passage of CICA, the government was required to use "formal advertising" in awarding its contracts. The government invited contractors to submit sealed bids for work, and the contract was awarded to the low bidder. The government could not, except under limited exceptions and with written justification, conduct negotiations with contractors instead of requesting bids, even when such negotiations were conducted competitively.

CICA "remove[d] the restriction from—and the written justification required for—competitive proposal procedures and place[d] them on par with sealed bid procedures." H.R. REP. NO. 861, 98th Cong., 2d Sess., (1984), *reprinted in* 1984 U.S.C.C.A.N. 2109, 2110. CICA made no changes to formal advertising except to change the phrase to "sealed bids." *Id.* No suggestion has ever been made that the competition for the contract awarded to Krygoski, in which seven other bidders participated, and which was essentially identical to the "formal advertising" process in effect prior to CICA and used in *Torncello*, was anything but "full and open."

Merely because CICA promotes full competition prior to the award of a contract does not mean that the government now possesses *carte blanche* to cancel existing contracts when it perceives an opportunity to conduct still further competition. The citations to the contrary in the Federal Circuit's opinion and quoted in the government's opposition do not support the propositions for which they are cited. For example, nothing in 10 U.S.C. § 2305 (1994) or 48 C.F.R. 1.602-2 (1997) supports the proposition that CICA may compel termination and reprocurement if "a contracting officer discovers that bid specifications inadequately describe the contract work." The closest the statute comes to this proposition is a statement that a contracting officer may cancel a *solicitation* at any time. Such a cancellation occurs prior to contract award; the statute does not speak at all to termination after award. Such silence with regard to post-award cancellation could just as easily be read as prohibiting such conduct, since it is not specifically allowed. *See* 2A NORMAN J. SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION §§ 47.23-47.25 (5th ed. 1992) (describing the doctrine of *expressio unius est exclusio alterius*, or "the expression of one thing is the exclusion of another").

At best, CICA has but indirect relevance to this case. The Federal Circuit and the various protest fora (e.g., the

General Accounting Office and the General Services Board of Contract Appeals) have limited when existing contracts can be modified. If a proposed modification falls outside the scope of the original competed contract, then it constitutes new work and must be competed as required by CICA. *See, e.g,, AT&T Communications v. WilTel*, 1 F.3d 1201, 1205 (Fed. Cir. 1993).

The trial court went to great lengths to consider what was contemplated by the original competition and the contract. *See* Petition at 22b-27b. It found, consistent with the reasoning later set out in *WilTel*, that abatement of all asbestos, whether known or unknown at the time of contract award, was contemplated.

The Federal Circuit did not overturn the finding of the trial court or conclude that termination was necessary under *WilTel* or CICA. Rather, the panel said that it would apply a lenient review standard should the contracting officer choose to do so. CICA does not provide any basis for this lenient review standard or the termination for convenience in this case.[3]

C. The Federal Circuit's Lenient Review of the Contracting Officer's Decision for Bad Faith or Abuse of Discretion Does Not Ensure That the Government's Promise is Supported by Consideration

The government argues that the termination for convenience clause does not render the contract illusory because its application is limited by the bad faith or abuse of discretion test. This is precisely the argument

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[3] Despite the implications of the panel decision, the decisions in *Salsbury* and *Caldweil & Santmyer* contain no references whatsoever to CICA. The passage of CICA in 1984 thus cannot explain the disparate results between *Torncello* and *Salsbury*. *See also Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988) (applying, post-CICA, the changed circumstances test of *Torncello*).

rejected by the plurality in *Torncello*. Petition at 30f-32f. As the *Torncello* plurality stated:

> It is bootstrapping to say that the government's claimed power of unlimited exculpation is saved by the limits on its discretion. Those limits must be derived from something else, but under the government's view there is nothing else.

One of the concurring judges in *Torncello* believed that the bad faith and abuse of discretion tests could constitute limits sufficient to satisfy the requirement of consideration. Petition at 36f. To the extent that the two opinions differ, it appears they do so because the plurality, referring to the requirement that bad faith be demonstrated by "well-nigh irrefragable proof," considers this limit too difficult to prove to be meaningful. The concurring opinion by Judge Davis would not define bad faith and abuse of discretion so narrowly as to make those tests meaningless.

To the extent that the government gains any solace or support from Judge Davis' concurrence, one can speculate as to whether Judge Davis would approve the "lenient test" applied by the panel in this case. Proving an abuse of discretion under a "lenient" standard is arguably as difficult as proving bad faith or abuse of discretion by "well-nigh irrefragable proof." Faced with this construction of the bad faith and abuse of discretion tests, Judge Davis might well have joined the plurality in *Torncello* in finding a "lenient" limit to be no limit at all.

D. The Fundamental Issue in This Case is the Meaning of the Convenience Termination Clause

The government's opposition contends that Krygoski should not be heard to complain because the termination clause was part of the "bargain" it made with the government. Opposition at 9. The whole point of this case, however, is an attempt to define, by interpretation,

the meaning of the bargain to which the government refers.[4]

Krygoski maintains that the bargain did not permit termination for matters contemplated by the contract. As found by the trial court, all that happened was that Krygoski performed the space by space, structure by structure, site inspection required by the contract and learned what should have already been known to the Government—that there was more and different asbestos present then previously actually known.

Krygoski did not bargain to lose the benefit of that bargain by its performance. The government should have known about the asbestos floor tile before contracting, just as the government should have known the published price for copper in *Colonial Metals v. United States*, 494 F.2d 1355 (Ct. Cl. 1974). Terminating for a reason which should have been known is an abuse of discretion, especially where the contract recognizes the possibility in the first place. Why else have the inspection clause? *See* Petition at 26b-27b. A *pre-existing* circumstance cannot constitute a *changed* circumstance. The only thing that changed was the extent of actual knowledge, not the circumstances of the work. Krygoski did not bargain for the government to possess such an unlimited right of repudiation.

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[4] To suggest that the termination clause was part of a "bargain" struck between the parties is something of a stretch. There was no bargaining; Krygoski submitted a sealed bid in response to an invitation which, pursuant to regulations, mandated the clause. The same can be said in reply to the government's argument that Krygoski was "willing" to enter such contracts even after the termination. *See* Opposition at 9 n.3.

E. The Present Dispute Is an Appropriate Case for Resolution

The government argues that this is not an appropriate case for review because the panel below held that "[t]he trial court improperly found no change of circumstances sufficient to justify terminating the contract for the Government's convenience." Opposition at p.11. This quotation has been taken out of context. The preceding sentence states: "The trial court erred by invoking and relying upon the *Torncello* plurality test." Petition at 16a. The two sentences read in conjunction make clear that what the panel found "improper" was not the trial court's *finding*, but the *application* of the *Torncello* plurality test.

Continuing to provide incomplete quotations, the government states that "the court further noted that 'arguably the Government's circumstances had sufficiently changed to meet even the *Torncello* plurality standard.'" Opposition at 11. Omitted from the government's brief is the rest of the panel's statement: "this court declines to reach this issue . . . ." Petition at 16a-17a. It is this decision—the decision to permit the government to terminate its contract with Krygoski without reviewing the termination against the *Torncello* changed circumstances test—that Krygoski challenges in its petition.

The work of the courts below has created a record which makes this case an appropriate vehicle to review the issues presented. The trial court fully considered the facts of the case and found that the changed circumstances test of *Torncello* had not been satisfied.[5]

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[5] The Federal Circuit itself recognized that "[t]he trial court thoroughly analyzed the factual circumstances and legal principles of this case. Its careful work properly framed the issues for this appeal." Petition at 5a.

The Federal Circuit declined to apply the changed circumstances test, holding as a matter of law that *Torncello* did not apply to this case. Should this Court rule that the changed circumstances test of the plurality in *Torncello* should have been applied, the factual findings of the trial court support a reversal of the Federal Circuit.[6] Petitioner maintains that the errors of law by the Federal Circuit would likely result in a different outcome here.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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[6] Likewise, the record supports a rejection of the lenient standard used by the Federal Circuit to evaluate whether the contracting officer abused his discretion, thereby justifying a reversal on that ground as well.